

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAY -4 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MARTIN H. FRICKE,)

Plaintiff/Appellant,)

v.)

RICHARD T. BRISTOL, Richard T. Bristol)
as Trustee of the Richard T. Bristol Trust, The)
Owner of Lot 70, of CATALINA)
FOOTHILLS ESTATES NO. 5 (5673 N. Mina)
Vista, Tucson, AZ 85718 [108-100-70]),)

Defendant/Appellee.)

2 CA-CV 2011-0195
DEPARTMENT B

MEMORANDUM DECISION
Not for Publication
Rule 28, Rules of Civil
Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20103442

Honorable Kyle Bryson, Judge

AFFIRMED

Martin H. Fricke

Tucson
In Propria Persona

Fidelity National Law Group
By Daniel E. Fredenberg and Brian J. Cosper

Phoenix
Attorneys for Defendant/Appellee

K E L L Y, Judge.

¶1 In this action arising from a dispute over a roadway running through his property, appellant Martin Fricke appeals from the trial court’s grant of summary judgment ruling that the property he owned was subject to an easement. Fricke argues the court erred because the subdivision plat governing his parcel of property had not properly established the easement or, in the alternative, the easement was extinguished by merger. For the following reasons, we affirm.

Background

¶2 “We view the facts and the inferences to be drawn from those facts in the light most favorable to the party against whom summary judgment was entered.” *Mousa v. Saba*, 222 Ariz. 581, ¶ 15, 218 P.3d 1038, 1042 (App. 2009). The Richard T. Bristol Trust, for which appellee Richard Bristol was the trustee, owned three contiguous parcels of land, described as “Lots 70, 71, and 72,” within a platted subdivision. A roadway that runs across the eastern boundaries of all three parcels provides access to a main roadway. In 2007, Fricke purchased Lot 71, which is located between Lots 70 and 72. The trust retained ownership of Lots 70 and 72, and Bristol continued to use the roadway running over Fricke’s Lot 71 to access Lot 70. Fricke likewise used the roadway to access Lot 71.

¶3 In 2010, after a dispute arose between Fricke and Bristol, Fricke brought a quiet title action in the trial court alleging that Bristol had no right to an easement over Fricke’s parcel. He maintained that no easement had been created because a quit claim deed and warranty deed in the parcel’s chain of title were defective. Fricke moved for

summary judgment on this ground, and Bristol filed a response and cross-motion for summary judgment contending that, regardless of the validity of the deeds, an easement existed over Fricke's parcel because one had been created by the subdivision's recorded plat map.

¶4 Following a hearing, the trial court ruled that the subdivision "plat identified and created an easement" where the roadway existed and, because the deed conveying Lot 71 to Fricke "specifically referenced the subdivision plat," the easement applied to his parcel. Accordingly, the court denied Fricke's motion for summary judgment and granted Bristol's cross-motion for summary judgment. Fricke filed a motion for a new trial, which the court denied. The court thereafter entered judgment, and Fricke filed this appeal.

Discussion

¶5 Fricke argues the trial court erred in granting summary judgment in Bristol's favor because the "language of the Dedication in the context of the Plat . . . simply is not enough to create" an easement. Fricke also claims that, even if the subdivision plat had created an easement, it would have been terminated by merger when Lots 70, 71, and 72 were sold by the developer to a common owner and was not recreated when the properties were resold. But, Fricke did not raise these arguments in the trial court.¹ And, "[a]n argument or a theory not urged at the trial court level cannot be

¹As Bristol points out, Fricke did argue, in his response to the cross-motion for summary judgment, that the plat could not create a valid easement as to a portion of the

asserted for the first time on appeal to reverse the granting of a summary judgment.” *Dillon-Malik, Inc. v. Wactor*, 151 Ariz. 452, 454, 728 P.2d 671, 673 (App. 1986); *see also Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994) (purpose of requiring party to make specific objection in trial court is to give court an opportunity to rule before appellant claims error in this court); *City of Tempe v. Fleming*, 168 Ariz. 454, 456, 815 P.2d 1, 3 (App. 1991) (“arguments not made at the trial court cannot be asserted on appeal”). Therefore, Fricke has waived these arguments, and we do not consider them further.

¶6 Moreover, the trial court is correct that a valid and enforceable easement can be created by a plat. *See Smith v. Beesley*, 226 Ariz. 313, ¶ 15, 247 P.3d 548, 553 (App. 2011). And this easement was marked on the original plat of the subdivision, which was referenced by the deed conveying the parcel to Fricke.² *Cf. Smith v. Second Church of Christ, Scientist, Phx.*, 87 Ariz. 400, 416-17, 351 P.2d 1104, 1115 (1960) (restrictions on property described on plat incorporated in deed by reference to plat). Therefore, this easement is enforceable as to Fricke’s parcel.

roadway existing outside the subdivision. But, this argument is not relevant to the issue of the validity of the easement over Lot 71, and it is not the argument Fricke now raises on appeal.

²If the easement over Fricke’s parcel to Lot 70 were invalid, the easement over Lot 72, which, according to Bristol, Fricke uses regularly to access his parcel, also would be invalid.

Disposition

¶7 The trial court's ruling is affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge